

December 30, 2009

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**IN THE SUPREME COURT OF THE STATE OF IDAHO**

**Docket No. 36386-2009**

<b>In the Matter of: JANE DOE and JOHN )</b>	
<b>DOE, Children Under the Age of 18. )</b>	<b>Boise, December 2009 Term</b>
<b>----- )</b>	
<b>FRED HEISS, ANNABELLE HEISS, and )</b>	<b>2009 Opinion No. 155</b>
<b>MAIA HEISS, )</b>	
<b>)</b>	<b>Filed: December 30, 2009</b>
<b>Petitioners-Respondents-Cross )</b>	
<b>Appellants, )</b>	<b>Stephen W. Kenyon, Clerk</b>
<b>)</b>	
<b>v. )</b>	
<b>)</b>	
<b>VIOLETTA CONTI, )</b>	
<b>)</b>	
<b>Respondent-Appellant-Cross )</b>	
<b>Respondent. )</b>	

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Appeal from the Magistrate Court of the First Judicial District of the State of Idaho, in and for Boundary County. The Hon. Justin W. Julian, Magistrate Judge.

The order of the magistrate court is affirmed in part and reversed in part.

Liesche & Reagan, P.A., Coeur d'Alene, and Tolin & Victoria, LLP, Seattle, for appellant. Anna M. Tolin argued.

Finney Finney & Finney, P.A., Sandpoint, for respondents. Rex A Finney argued.

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In a unanimous opinion released today, the Idaho Supreme Court affirmed in part and reversed in part the magistrate court's decision in this case. This case was a child custody dispute arising after a tragic automobile accident took the lives of Karl Heiss and Marisa Bauducco-Heiss. Karl and Marisa were married with two young children and had set out upon a trip to visit friends in Seattle and Karl's parents in Southern California, before flying to Argentina for an extended visit with Marisa's family. Karl and Marisa left holographic wills naming Marisa's mother, Violeta Conti, as the children's guardian, with the children to spend one month of the year with Karl's parents, Anna and Fred Heiss.

Upon probating the will, Ms. Conti filed a petition to accept the testamentary guardianship and the Heisses filed a petition to be appointed as guardians. The magistrate court determined that if the Heisses wished to challenge the will's appointment of Ms. Conti as guardian, the Heisses would have to show Ms. Conti to be unfit to be a guardian. The magistrate court also determined that Karl and Marisa intended a coguardianship between Ms. Conti and Mr. & Mrs. Heiss. Ms. Conti appealed the granting of coguardian status for one month of the year to the Heisses, arguing they should have been granted visitation instead. The Heisses cross-appealed the granting of primary guardian status to Ms. Conti, arguing the magistrate court erred in requiring Mr. & Mrs. Heiss to prove Ms. Conti was unfit in order to rebut the will's granting of guardianship. The Heisses argued the correct standard was whether the best interests of the children would be served if the children were to live with the Heisses or with Ms. Conti in Argentina.

The Idaho Supreme Court held that the will's provisions did not appoint the Heisses as coguardians and reversed the magistrate's order appointing the Heisses as coguardians. The Supreme Court held that the magistrate court erred in interpreting the wills in a manner that would have, in the magistrate court's opinion, better accomplished the parent's objectives. The Court held that the magistrate court should have interpreted the wills as written.

The Idaho Supreme Court affirmed the magistrate court's order denying the Heisses' motion to remove Ms. Conti as guardian. The Heisses' argument for removal of Ms. Conti as guardian misconstrued the meaning of the words "best interest" in Idaho Code section 15-5-212(a). The Heisses argued that "best interest" should be construed in the same manner as in divorce actions, wherein the court must compare two fit parents to determine which of them should have primary physical custody of a child. The proper standard is whether it is in the best interest of the ward to remove the guardian appointed by will, looking solely at the guardian and not comparing the guardian to any potential successor guardian.